No. -

IN THE

# Supreme Court of the United States

October Term, 1982

IN RE: NATIONAL AIRLINES, INC., MATERNITY LEAVE PRACTICES AND FLIGHT ATTENDANT WEIGHT PROGRAM LITIGATION

BARBARA ANN GARDNER AND SUSAN GAIL LEONARD, et al., and

INDEPENDENT UNION OF FLIGHT ATTENDANTS,
*Petitioners,*

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## Question Presented

Did the court of appeals err in creating a new rule of law permitting a successor corporation to continue an employment practice found by the district court to violate Title VII of the Civil Rights Act of 1964 and for which decisions of this Court require that an injunction issue against the predecessor?

## Parties to the Proceedings Below

The parties to the proceedings in the court of appeals were respondent Pan American World Airways, Inc., as a successor in interest to National Airlines, Inc., petitioner Independent Union of Flight Attendants, and the petitioner plaintiff class of female flight attendants employed by National Airlines, Inc., on or after April 6, 1973. The representatives of the plaintiff class are Susan Gail Leonard and Marilyn White. Pan American World Airways, Inc., acquired National Airlines, Inc., in January, 1980, and was substituted for National Airlines, Inc., as a defendant in this action in January, 1982.

The decision for which review is sought concerns the rights of the plaintiff class to injunctive relief under the remedial provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

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The petitioners, a plaintiff class consisting of female flight attendants formerly employed by National Airlines, Inc., and the Independent Union of Flight Attendants, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 17, 1983.

## Opinions Below

The opinion of the Court of Appeals for the Eleventh Circuit for which petitioners seek review is reported at 700 F.2d 695 (11th Cir. 1983), and is reproduced in the Appendix at page A-1. The opinion addresses whether an injunction is an appropriate remedy in this case. The mandate issued by the court of appeals is reproduced in the Appendix at page A-20. The order of the District Court for the Southern District of Florida at Fort Lauderdale, which was affirmed by the court of appeals, is reproduced in the Appendix at page A-22. The Memorandum Opinion of the district court determining issues of liability relevant to the formulation of proper

remedies is reported at 434 F. Supp. 249 (S.D. Fla. 1977) and is reproduced in the Appendix at page A-25.

## Jurisdiction

The judgment of the Court of Appeals for the Eleventh Circuit was made and entered on March 17, 1983. This Court possesses jurisdiction under 28 U.S.C. § 1254(1).

## Statutes Involved

1. 42 U.S.C. §2000e-2(a), which provides:

§2000e-2. *Unlawful employment practices.*

**Employer Practices**

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. 42 U.S.C. § 2000e-5(g) which provides:

§ 2000e-5. *Enforcement provisions.*

* * * *

*Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders*

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay (payable

by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

## Statement of the Case

### A. Course of Proceedings.

A certified plaintiff sub-class and the Independent Union of Flight Attendants, petitioners, seek review in this Court of a decision by the Court of Appeals for the Eleventh Circuit affirming an order of the district court. The district court's order denied a motion by the plaintiff class for a permanent injunction prohibiting the continued implementation with respect to the plaintiff class of an employment practice held by the district court to be discriminatory on grounds of sex in violation of 42 U.S.C. § 2000e-2(a).

This class action lawsuit was initiated by female employees of National Airlines, Inc. ("National") under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") who contended that National's maternity leave employment practices constituted unlawful sex discrimination. Among the practices challenged was National's requirement that its flight attendants report

pregnancies and commence unpaid maternity leave immediately upon learning they were pregnant.[1]

The plaintiffs sought a declaration that National's maternity leave practices were unlawful, an award of back pay for periods during which members of the plaintiff class were unlawfully denied employment, and an injunction prohibiting further implementation of National's maternity leave practices. To obtain complete injunctive relief, the plaintiffs joined as a defendant the union certified as the plaintiffs' collective bargaining representative.

The district court defined the plaintiff class as follows:

> Female flight cabin attendants represented by Susan Gail Leonard and Marilyn White who have been employed by National Airlines, Inc., on or before April 6, 1973, or who may become so employed in the future and non-flying female employees represented by Barbara Ann Gardner and Sherri Knipple, who have been employed by National Airlines, Inc., on or after May 29, 1972, or who may become so employed in the future. The female flight cabin attendants as denominated above shall be considered a sub-class of the above class.

The district court bifurcated for separate trial the liability and remedy issues raised by the plaintiffs. Following trial of the liability issues, the district court entered a memorandum decision finding National's maternity leave practices with respect to the sub-class of female flight attendants unlawful under Title VII. As part of its opinion, the district court described the limits of a flight attendant maternity leave practice which would comply with Title VII and accommodate National's concerns for passenger safety. *See In re National Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977), reproduced in the Appendix at page A-25.

Prior to any ruling by the district court on remedies, Pan American acquired National under a Civil Aeronautics Board order. Pan American's acquisition of National was completed through a merger on or about January 19, 1980, and plaintiffs

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1. The matter for which this Court's review is sought involves only maternity leave practices applicable to the subclass of female flight attendants.

moved for substitution of Pan American as the real party in interest. The motion was not opposed by Pan American. In January, 1982, the district court ordered Pan American substituted as a defendant, and the petitioner International Union of Flight Attendants ("IUFA") substituted for the previously named union defendants.[2]

In February, 1982, the district court denied a pending motion by plaintiffs for a permanent injunction requiring the defendant to conform its flight attendant maternity leave practices so that the plaintiff class would be protected from the practices the court had held were unlawful under Title VII. In denying the requested relief, the district court held that Pan American, as successor to National, was subject to the district court's ruling that National's flight attendant maternity leave practices violated Title VII and that Pan American would be required to remedy the effects of those practices. Pan American has acknowledged this liability. However, the district court concluded that in deciding whether to enter an injunction Pan American's status as a "successor" employer gave the court the discretion to balance the interests of the plaintiffs, the sucessor, and the public. The district court then held that under the facts of the case, entry of an injunction was "not appropriate." One of the factors considered by the district court in its balancing of interests was Pan American's successful defense of its maternity leave practices in *Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413 (N.D. Cal. 1977), *aff'd in relevant part*, 649 F.2d 670 (9th Cir. 1980). The court of appeals affirmed the decision of the district court, finding that the court had not abused its discretion in denying the motion.

**B. Statement of Facts.**

National's collective bargaining agreement with its flight attendants established the maternity leave practices challenged by plaintiffs. The mandatory leave requirement

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2. The petitioner IUFA moved to realign itself as a party plaintiff. After denial of that motion, IUFA joined in the plaintiff's motion for a permanent injunction.

was strictly enforced by National, and flight attendants reporting their pregnancy were placed on leave immediately.

At trial before the district court, National contended that the maternity leave requirements did not constitute sex discrimination under Title VII., National also argued that even if its practice were discriminatory the condition of "non-pregnancy" was a bona fide occupational qualification or a business necessity protected under Title VII, because pregnancy rendered flight attendants less able to perform their essential, safety-related duties.

Evidence was presented to the district court with respect to the duties of National flight attendants, the type of aircraft and flight equipment utilized by National, the type of routes and duration of flights flown by National, the conditions under which National flight attendants worked, and the effect of pregnancy on the ability of flight attendants to safely and effectively perform their duties. The district court made numerous findings of fact regarding the specific characteristics of National's flight operations and the working conditions experienced by National's flight attendants.

Following trial, the district court held that National's maternity practices for flight attendants constituted sex discrimination in violation of Title VII. Based on the characteristics of National's aircraft and flights and the medical evidence produced, including the medical history of certain of National's own flight attendants who worked during pregnancy in violation of National's policy, the district court concluded that National flight attendants could perform all flight duties effectively during the first thirteen weeks of pregnancy. Accordingly, it ruled that National must permit flight attendants to fly through the thirteenth week of pregnancy. The district court also held that after the thirteenth week of pregnancy National could require medical certification that a pregnant flight attendant was medically fit and capable of carrying out her assigned duties as a condition to her continued employment, and held that National could prohibit flight attendants from working past the twentieth week of pregnancy.

Prior to its January, 1980 merger with Pan American, nearly all of National's routes were domestic. By contrast, Pan American was principally an international carrier. Before the merger, Pan American had successfully defended its maternity leave practices for flight attendants in a Title VII action filed in the District Court for the Northern District of California. *Harriss v. Pan American World Airways, Inc.*, *supra*. Although applied to flight attendants having different working conditions than those for National, the Pan American maternity leave policy was stated in terms substantially the same as the National policy (requiring notice to Pan American and beginning leave immediately upon knowing of pregnancy). The Northern District of California held that, under Pan American's operational and working conditions, Pan American's duty to provide for the safety of its passengers justified its maternity leave policy.

Through the January, 1980 merger, Pan American acquired National's aircraft and employees and nearly all of National's routes. Since the merger, Pan American has operated the former National routes and utilized the former National employees and equipment in its flight operations. For a substantial period of time, National and Pan American flight attendants were segregated into "Orange" and "Blue" divisions and flew only on former National and former Pan American aircraft and routes, respectively. This segregation now has been eliminated with the merger of the separate seniority lists, although some distinctions continue to be made for administrative and pay purposes between former National and former Pan American flight attendants.

Pan American has required all its post-merger flight attendants, including the former National flight attendants, to comply with its mandatory maternity leave policy. As noted above, this policy is stated in terms substantially identical to that which National had maintained. Consequently, flight attendants presently are required to report pregnancies and to commence unpaid maternity leave as soon as they become aware they are pregnant, just as they were under the practices held by the district court to violate Title VII. This requirement is enforced even on former

National routes, where working conditions are virtually unchanged from those examined by the district court in finding the practice unlawful.

### Existence of Jurisdiction Below

The plaintiffs brought this suit in the district court pursuant to 42 U.S.C. § 2000e(5) and 28 U.S.C. §§ 1337 and 1343 to enforce federal rights granted by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Plaintiffs' appeal to the court of appeals was based upon 28 U.S.C. § 1292(1) which grants the courts of appeals jurisdiction of appeals from orders of the district courts granting, continuing, modifying, refusing, or dissolving injunctions.

### Reasons for Granting the Writ

#### A. The Decision of the Court of Appeals is Directly Contrary to the Purposes of Title VII and the Rulings of this Court that Unlawful Employment Practices Must be Eliminated.

The decision of the court of appeals is directly contrary to the objectives of Title VII and the rulings of this Court that district courts have the affirmative duty to formulate relief in Title VII actions which will eliminate continuing unlawful discrimination. The court of appeals below assumed a continuing and present violation of Title VII in this case, yet has formulated a new rule of law for fashioning remedies which accords the district court the discretion to permit the violation to continue. The justification for this new rule is the presence of a "successor employer."

The decisions of this Court consistently have held that any relief necessary to eliminate the effects of a discriminatory employment practice can be denied successful Title VII plaintiffs only if to do so would not frustrate the central purposes of Title VII. The new rule adopted below is in direct conflict with the central purposes of Title VII, as repeatedly recognized by this Court. It serves no legitimate policy objectives and is based upon an incorrect application of "successor employer" principles developed in the labor law

context. Under a proper application of Title VII and the rulings of this Court, Pan American as a successor to National should have been enjoined from a continuing violation of Title VII, *i.e.*, from applying the maternity leave policy found unlawful by the district court to the extent that the flight attendants continued to be employed under the conditions the district court examined in reaching its decision on liability.

The paramount purpose of Title VII is to eliminate employment discrimination on the grounds of race, sex, religion or national origin. *Franks v. Bowman Transportation Co.*, 424 U.S 747, 763 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 51 (1974). Congress "ordained that its policy of outlawing such discrimination should have the 'highest priority'" (citations omitted). *Franks v. Bowman Transportation Co., supra* at 763.

This policy and the broad remedial provisions of Title VII have been construed by this Court to impose a duty on the courts to eliminate discrimination and its effects. The courts' discretion in fashioning relief, accordingly, must be exercised to afford the most complete relief possible under the circumstances. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court expressed these principles in very concrete terms:

> Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms "complete justice" and "necessary relief" have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future*." *Louisiana v. United States*, 380 U.S. 145 (1965).

(Emphasis added.) *Id.* at 418. In *Moody* the Court held that district courts possess not only the broad power but the duty to provide discrimination victims the most complete relief

possible.[3] The Congressional mandate to eliminate employment discrimination is so strong that the employees' right to be free of discrimination cannot be waived through bargaining, since any such waiver would defeat the Congressional purpose behind Title VII. *Alexander v. Gardner-Denver Co., supra* at 51-2. The courts of appeals have the correlative obligation to review the Title VII remedy decisions of district courts to ensure that the district courts have satisfied the duty to eliminate discrimination.

In *Franks v. Bowman Transportation Co., supra*, the Court recognized that in shaping a remedy for past discrimination some balancing of interests may be appropriate. Such an "exception" is, however, limited; relief which would eliminate the effects of a discriminatory practice can be denied "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Franks v. Bowman Transportation Co.*, 424 U.S. at 771, *quoting Albemarle Paper Co. v. Moody*, 422 U.S. at 421. Even in this balancing, the interests of the discrimination victims must take priority over those of innocent incumbent employees if the purposes to Title VII are to be effectuated. *Franks v. Bowman Transportation Co.*, 424 U.S at 777-779.

No such balancing is appropriate when the court is faced with a continuing violation of Title VII. The court of appeals below correctly recognized that injunctive relief is mandatory absent clear and convincing evidence that there will be future compliance with Title VII by the defendant.

> In such instances, this court has stated that 'injunctive relief is *mandatory* absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law.' *NAACP v. City of Evergreen Alabama*, 693 F.2d 1367, at 1370 (11th Cir.

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3. This Court in *Moody* assumed implicitly that successful Title VII plaintiffs would be entitled to prospective relief from an unlawful employment practice: "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albermarle Paper Co. v. Moody*, 422 U.S. at 417.

> 1982) (emphasis in original). *See also, James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

*In re National Airlines, Inc.*, 700 F.2d 695, 697 (11th Cir. 1983), A-9 to A-10 in the Appendix.

Notwithstanding its acknowledgement of the proper rule to be applied in the "usual" case, the court went on to create a new rule for application in the "unusual" case of a successor employer. The court held that "the balancing of interests, fact specific analysis employed by the Supreme Court in labor law successor cases is the proper method for determining whether a successor employer should be bound by the Title VII transgressions charged against its predecessor." *In re National Airlines, Inc., supra* at 698.

As an initial proposition, there are two aspects of this opinion which should be noted. First, application of the rule created by the court is *not* limited to the relatively unusual facts of this case.[4] It is broadly stated, applying to any situation in which a successor employer is found. Second, the opinion assumes that an injunction could be issued—that a proper object of an injunction exists. The rule, therefore, assumes that there is a continuing or ongoing violation of Title VII. In essence, the rule permits the court to authorize an ongoing violation of Title VII. The court of appeals, reaching into the analogy of labor law which supports its

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4. The court of appeals' opinion contains reference to what the court perceived as conflict between the decisions of the District Court of the Southern District of Florida and the District Court for the Northern District of California with respect to Title VII liability for the flight attendant maternity leave policies of National and Pan American. However, the possibility of such a conflict did not weigh in the court's formulation of its rule of law permitting an exercise of discretion in the case of a successor corporation. The potential conflict was considered only as a factor in the court of appeals' determination that the district court did not abuse the discretion, in rendering its remedy decision, which the presence of Pan American as a successor had created. Petitioners, of course, do not agree that any conflict exists and would submit that an injunction can be entered without infringing on the judgment in *Harriss v. Pan American World Airways, supra*.

opinion, suggests that this result follows from "pragmatizing" the corporate and labor relationship. *Id.* at 698, n.4.

Title VII, however, does not permit a court to be pragmatic in deciding whether to require termination of unlawful discrimination. Nothing in Title VII or its legislative history even infers that a district court may rationalize permitting discrimination to continue. If it no longer exists, an injunction is not required and need not be entered. If discrimination is ongoing, every teaching of Title VII requires that it be eliminated without exception. To permit otherwise is to undermine the paramount objective of Title VII.

No public policy is offered by the court of appeals to support its new rule. Certainly pragmatism is not itself an objective to be supported. Nor is difficulty of implementation a justification for withholding relief.

Because this issue has not been addressed by either the Supreme Court or the Eleventh Circuit, the court of appeals formulated its rule by reasoning by analogy from successor liability cases arising in the labor relations context. As characterized by the court, these cases consider whether a successor corporation "should be held liable for unfair labor practices of its predecessor, should be bound by labor contracts between the predecessor and its employees, or, instead, should not be affected by the labor relationships of its predecessor." *In re National Airlines, Inc.*, *supra* at 698.

The attempt by the court to resolve the present case by recourse to principles developed in the labor law context is incorrect for at least two reasons, and constitutes a serious misapplication of this Court's labor law precedents. First, the cited labor law precedents are inapposite to a case involving remedies for ongoing discrimination. The labor law cases on successor liability for unfair labor practices—possibly the closest analogy—focus on whether a sufficient nexus exists between the predecessor and successor that, in fairness, the successor should be held responsible to remedy injuries caused by conduct of the predecessor. They deal with remedies for violations that have occurred in the past and are not ongoing. In the terms expressed by the court of appeals,

should the employer "not be affected by the labor relations of its predecessor"? *In re National Airlines, Inc., supra* at 698. These cases generally involve liability for back pay, seniority adjustments, etc., or a requirement to reemploy a fired worker. The balancing test which they suggest approximates the balancing of interest permitted under Title VII in formulating remedies for past discrimination. *See Franks v. Bowman Transportation Co., supra.*

Petitioners agree, then, that such an analogy may be accurate and useful in considering whether a successor should be liable for the *past* labor relations of its predecessor. In this limited context, the labor law case analysis has been adopted in Title VII cases by several courts. *See, e.g., EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974), and other cases cited in *In re National Airlines, Inc., supra* at 698. The labor law cases may even be useful in broad terms in analyzing whether a new employer is a "successor" and a proper party to the litigation.

In the present case, however, the court must be concerned with a present violation—at issue are the labor relations of the successor, not those of the predecessor. The successor employer cases arising in the labor law context have been concerned with the fairness of imposing burdens on an innocent successor. But in this case, there is no innocent successor; the successor has continued the unlawful conduct and is at least as culpable as the predecessor. The conduct of the predecessor has nothing to do with the decision on an injunction, except for the court to consider whether the practices of the predecessor found to be unlawful are being continued by the successor. The labor law cases cited by the court of appeals offer no guidance in this area.

The remaining labor law cases cited by the court of appeals consider whether a successor should be bound by the labor contracts of its predecessor. These involve an entirely different set of policy considerations than those which underlie Title VII. This, then, is the second defect in the court's analysis: its failure to recognize that the policies which permit the courts to pragmatically balance employer and employee

interests in labor relations law are substantially different from those that are at the base of Title VII.

In *Alexander v. Gardner-Denver Co., supra*, this Court identified the fundamental difference between the labor law upon which the court of appeals relied and Title VII. The Court held, *inter alia*, that the plaintiff had not waived his cause of action under Title VII by provisions of a collective bargaining agreement. Recognizing that a waiver of statutory rights relating to collective bargaining was possible in the labor law context, the Court refused to extend waiver concepts to Title VII cases.

> These [labor law] rights are conferred on employees collectively to foster the process of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. *Title VII's structures are absolute and represent a congressional mandate that each employee be free from discriminatory practices.*

*Alexander v. Gardner-Denver Co., supra* at 51 (emphasis added).

A balance in employee-employer relations, and the collective bargaining process as a device to achieve that balance, are at the heart of the labor law relied upon by the court of appeals. They readily admit of a pragmatic balancing of interests. But under Title VII, the employee's rights to be free of discrimination is immutable; the congressional bar is absolute. No balancing of employee rights can be accommodated under Title VII.

When addressing ongoing discrimination, there is no need to look beyond Title VII for rules to aid in fashioning a remedy. The "usual" Title VII remedy of an injunction is required to satisfy the absolute congressional directive that discrimination be eliminated. The identity of the employer maintaining the discrimination—whether the original employer or a successor marching in the predecessor's path—is irrelevant. Only where the successor has eliminated the unlawful discrimination, either by a change in practice or a

necessary change in work conditions such that the discrimination is justified, need an injunction not be issued.

The objectives of Title VII and the holdings of this Court compel the conclusion that, to the extent the actual employment conditions under which the successful plaintiffs are employed remain unchanged following a change in ownership of the employer, the successor must be prohibited from implementing the illegal policy against the plaintiffs. The decision of the court of appeals fails to require the district court to fulfill its duty under Title VII to eliminate prospectively the employment practice the district court found violative of Tile VII. The new rule adopted by the court of apppeals so sanctions a departure by the district court from the remedial objective of Title VII and from this Court's prior rulings that review by this Court should be granted.

**B. The Decision of the Court of Appeals Involves Important Questions Regarding the Liability of Successor Employer Defendants in Title VII Cases Which Have Not Been but Should Be Settled by This Court.**

The decision by the court of appeals involves the important question of the extent of the liability of successor employer-defendants in Title VII cases. This question has not been considered, but should be settled by this Court. Additionally, the decision of the court of appeals creates substantial uncertainty with respect to the extent of relief due successful Title VII plaintiffs employed by a successor employer and with respect to the necessity for the district court to exercise ongoing jurisdiction to supervise and adjudicate such relief.

The court of appeals followed the lead of the Sixth and the Eighth Circuits and several district courts in referring to the successor liability doctrines enunciated by this Court in the labor law context for guidance in determining whether Pan American should be required to remedy National's Title VII violations. *See Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union, Local 64*, 674 F.2d 732 (8th Cir. 1982); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981); *Burt v. Ramada Inn of Oxford,*

*Mississippi*, 507 F. Supp. 336 (N.D. Miss. 1980); *Brown v. Evening News Association*, 473 F. Supp. 1242 (E.D. Mich. 1979); *Escamilla v. Mosher Steel Company*, 386 F. Supp. 101 (S.D. Tex. 1975).

As noted above, petitioners agree that the principles of the labor law successor liability doctrine discussed in the cases cited can provide a useful guide for determining *whether* a successor employer should be held liable for the Title VII violations of its predecessor. However, once it is determined that a successor should be responsible to remedy the Title VII violations of the predecessor, the remedy should be shaped in accordance with the principles of Title VII and not of a general labor law. In the present case, once the district court determined that Pan American was liable as a successor employer, it should have been required to apply the same remedial policies of Title VII to Pan American as would have been applicable to National had it remained in a position to provide plaintiffs with prospective relief. The court of appeals failed to require the district court to do this.

The Sixth and Eighth Circuit decisions which applied the labor law successor liability doctrine to Title VII cases addressed only the question of whether or not a successor properly should be required to remedy its predecessor's Title VII violations. In *Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union, Local 64*, *supra*, the Eighth Circuit held that where a successor had no direct or indirect knowledge of the employment discrimination charges of the plaintiffs at the time it purchased the predecessor's business at a foreclosure sale, the district court's ruling that the successor was not liable to remedy its predecessor's Title VII violations was not erroneous.

In *EEOC v. MacMillan Bloedel Containers, Inc.*, *supra*, the Sixth Circuit reversed the district court's summary judgment granted in favor of the successor employer on the ground that a determination of whether or not the successor should be liable to remedy its predecessor's violations was a factual question precluding summary judgment.

The decision of the court of appeals goes further than the Sixth and Eighth Circuits and concludes that where a successor is liable for remedying the predecessor's Title VII violations the district court has broad discretion to consider the interests of the successor, among other factors, in determining whether to grant the plaintiffs relief from an unlawful practice. Whether the district court has such discretion has not been but should be decided by this Court.

The court of appeals relied upon cases arising under the National Labor Relations Act, 29 U.S.C. 151 *et. seq.*, in concluding that the district court had broad discretion to determine the extent of Pan American's successor liability to the plaintiffs. *See In re National Airlines, Inc.*, 700 F.2d at 699, n.5, appearing at A-18 in the Appendix. The cases cited by the court of appeals, however, are cases applying the remedial objectives of the National Labor Relations Act to successor employers. As discussed above, the remedial objectives of Title VII differ greatly from those of the National Labor Relations Act under which "private bargaining under government supervision of the procedure alone, without any official compulsion over the actual terms of the contract" is the objective to be fostered. *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 254 (1974), quoting *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

It is axiomatic that remedy decisions in Title VII cases should be made and reviewed with the aim of achieving the Title VII objective of elimination of unlawful discrimination. Yet the decision of the court of appeals below was made without reference of the objectives of Title VII, only with regard to the pragmatic balancing of interests characteristic of labor law policy under the National Labor Relations Act. If objectives from outside Title VII are now to be read into the remedial provisions of Title VII, it should be done at the direction and with the guidance of this Court.

The decision of the court of appeals also creates substantial uncertainly with respect to the nature of the relief which Pan American must provide the plaintiffs and the extent to which the district court must supervise the remedy afforded

plaintiffs by Pan American. The opinion of the court assumes that there is an ongoing violation of Title VII, and effectively authorizes it to be continued. If there is an ongoing violation, surely there must be a remedy for affected employees. The implication of the court's opinion is to require a continuing award of retrospective remedies—*e.g.*, back pay, adjustment of benefits, etc.—as individuals suffer injury by the unlawful practice. Particularly, for those injuries that are not amenable to ready calculation—losses of benefits and privileges during mandatory leave periods—continual intervention by the court will be required to provide a remedy.

Petitioners submit that such a result is not in the interest of either employer or employee. It creates uncertainties in the employment relationship that will become a continuing point of friction. Most importantly, however, the judicial administration which would be required by the new rule could add significantly to the adminstrative burden of the courts.

Finally, it should be considered that the principal effect of the new rule is simply to increase the burden on the courts by requiring plaintiffs to file a second lawsuit to obtain the relief they were due in the first. Assuming, as did the court of appeals, that the violation is ongoing, plaintiffs need simply file a new lawsuit under Title VII directly against the successor with respect to the ongoing practices adjudicated in the first case. If there were a sufficient connection between the predecessor and successor that the successor could be joined in the first case, then under principals of collateral estoppel and res judicata the successor would be bound in the second lawsuit by the finding in the first that the practices complained of are unlawful under Title VII. *See Montana v. United States*, 440 U.S. 147 (1979); *Parkland Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); 1B Moore's *Federal Practice* ¶ 0.411[1] (2d ed. 1982). This would be the "usual" case, recognized by the court of appeals below, in which an injunction is mandatory. Recourse to this procedural mechanism without a substantive result different from that which could have been obtained in the first case is nonsense, and imposes an unnecessary and unreasonable burden on the courts.

## CONCLUSION

For these reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Eleventh District.

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**Certificate of Service**

I, WILBERT CARL ANDERSON, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 15th day of June, 1983, three copies of the foregoing Petition for Writ of Certiorari were mailed, first-class, postage prepaid, to Barry R. Davidson, Esq., 1400 Southeast First National Bank Building, Miami, Florida 33131, counsel for Pan American World Airways, Inc. I further certify that all parties required to be served have been served.

/s/ _____
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APPENDIX

In re NATIONAL AIRLINES, INC.,
Maternity Leave Practices and Flight
Attendant Weight Program Litigation.

No. 82-5376.

United States Court of Appeals,
Eleventh Circuit.

March 17, 1983.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

The plaintiffs-appellants, National Airlines (National) female flight attendants, appeal the decision of the United States District Court for the Southern District of Florida denying their request for an injunction against Pan American World Airways (Pan American), in a class action brought pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The

district court had earlier held that National's maternity leave policy violated Title VII as discriminatory on the basis of sex. The attendants later moved for an injunction to Prohibit Pan American, which had acquired National after the initial adjudication of sex bias, from enforcing its identical maternity leave policy. At issue here is whether the district court abused its discretion in denying the appellants' application for an injunction.

In the 1970's, female flight attendants employed by several airlines instituted various actions against their employers challenging their maternity leave policies on the grounds that the rules constituted unlawful sex discrimination. By order of the Judicial Panel on Multidistrict Litigation, the lawsuits brought against National by its female flight attendants were consolidated for trial in the United States District Court for the

Southern District of Florida. In Re National Airlines, Inc. Maternity Leave Practices and Flight Attendant Weight Program Litigation, 399 F.Supp. 1405 (J.P.M.D. 1975). Unfortunately, even though similar pregnancy leave policies of other airlines were under attack in several district courts throughout the country, the lawsuits were not combined in one action.[1]

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1. In its May, 1977 decision, the district court pointed out this problem. The court stated that it "has discovered that similar lawsuits are pending against Eastern Airlines, Western Airlines and Pan American World Airways." In re National Airlines, Inc. maternity Leave Practices and Flight Attendant Weight Program Litigation, 434 F.Supp. 249, 252 (S.D.Fla. 1977). It is perhaps ironic that the court foresaw the dilemma now evident here when it noted "[t]he result of such similar litigation being tried in various district courts may well be a divergence of decisions, which not only will affect the litigants but until higher courts have achieved some uniformity, will also leave flight attendants, ground employees and employer airlines which are not parties to these cases in some doubt as to what their policy should be." Id. at 253.

The policy under challenge in this appeal requires a female flight attendant to notify the airline immediately upon discovering that she is pregnant. At that time, the attendant is placed on mandatory unpaid maternity leave and is not permitted to return to work until after the termination of the pregnancy. An attendant who fails to furnish such notification is subject to dismissal by the company.[2]

During the bench trial on the merits of the case, experts testified about the effects of pregnancy on the abilities of flight attendants to perform their responsibilities. National asserted that the policy was necessary because pregnancy could prevent flight attendants from adequately insuring the safety of the

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2. For a more detailed description of the policy, its background and the context in which disputes concerning the policy arose, see 434 F.Supp. at 253-55.

passengers. The district court held that the policy constituted a prima facie violation of Title VII's prohibition of sex discrimination. Examining National's reasons for the policy, the court concluded that National's interest in the safety of its passengers justified the mandatory leave as a bona fide occupational qualification after the twentieth week of pregnancy. The court found, however, that the attendants should be allowed to fly during the first trimester because that stage of pregnancy would not interfere with the flight attendants' performance of their safety duties and that they could continue to work during the thirteen-twenty week period of pregnancy, as long as they were certified capable by a National Airlines physician. In re National Airlines, Inc. Maternity Leave Practices and Flight Attendant Weight Program Litigation, 434 F.Supp. 249 (S.D.Fla. 1977).

Approximately three months after the announcement of the Southern District of Florida decision, the United States District Court for the Northern District of California determined that Pan American's identical maternity leave practice did not violate Title VII. That court was persuaded that Pan American's duty to provide for the safety of its passengers justified the policy because pregnancy could obstruct the safety functions of its attendants. Harriss v. Pan American World Airways, 434 F.Supp. 413 (N.D.Cal. 1977), aff'd in relevant part 649 F.2d 670 (9th Cir. 1980).

This disparity in the district court judgments might have been nothing more than academically troublesome at this point. However, the theoretical problem became an actual conflict in 1980 when Pan American acquired National through a merger. After the acquisition was announced, the Ninth Circuit affirmed the Harris decision

thereby validating Pan American's policy. This opinion did not mention the acquisition or the judgment favorable to the appellants in the Southern District of Florida. Thus, the first opportunity to address this collision of decisions did not provide a resolution of the problem.

Following the acquisition, Pan American continued to enforce its mandatory maternity leave policy against pregnant flight attendants of both National and Pan American.[3] In September, 1980, the former National flight attendants filed a motion in the Florida district court to enjoin Pan American from applying its policy to the former National plaintiff

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3. It also appears that National continued to follow its prior leave plan after the 1977 district court decision. No explanation is given as to why National did not voluntarily change its policy after it had been declared unlawful and why the plaintiff class did not seek an injunction immediately thereafter.

class. The district court substituted Pan American as a defendant for National in January, 1982. Subsequently, in February, 1982, the district court denied the injunction. The court concluded that although Pan American would be liable as a successor corporation for money damages arising from the National lawsuit, on balance, it would be inequitable to restrain Pan American from pursuing a course of action theretofore declared valid by another federal district court. This appeal followed.

It should be noted at the outset that the merits of the district court's 1977 decision are not before this court for review in this appeal. We therefore express no opinion concerning the propriety of the district court's original decision finding National's mandatory maternity leave policy unlawful. These same policies have been examined by several courts, without any emerging uniform resolution.

See, e.g., Burwell v. Eastern Air Lines, Inc., 633 F.2d 361 (4th Cir. 1980); Air Line Pilots Association et al. v. Western Air Lines, Inc., 23 Fair Empl.Prac. Cas. (BNA) 1042 (N.D.Cal. 1979); Maclennan v. American Airlines, Inc., 440 F.Supp. 466 (E.D.Va 1977); Condit v. United Air Lines, Inc., 13 Fair Empl.Prac.Cas. (BNA) 689 (E.D.Va 1976), cert. denied, 435 U.S. 934, 98 S.Ct. 1519, 55 L.Ed.2d 531 (1978); United Air Lines, Inc. v. State Human Rights Appeal Board, 61 A.D.2d 1010, 402 N.Y.S.2d 630 (N.Y.App.Div. 1978), cert. denied, 439 U.S. 982, 99 S.Ct. 571, 58 L.Ed.2d 653 (1978). For purposes of this appeal, we assume that the district court's substantive decision is correct and confine ourselves to the remedial issues.

As a general rule, district judges have broad discretion in the fashioning of orders to remedy past and present discrimination. See, e.g., Harper v. Thiokol

Chemical Corp., 619 F.2d 489, 494 (5th Cir. 1980). See also, 42 U.S.C. § 2000e-5(g). Nevertheless, this discretion has been severely limited in cases involving ongoing discrimination. In such instances, this court has stated that "injunctive relief is mandatory absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law." NAACP v. City of Evergreen Alabama, 693 F.2d 1367, at 1370 (11th Cir. 1982) (emphasis in originaal). See also, James v. Stockham Valves & Fittings Co., 559 F.2d 310, 354 (5th Cir. 1977), cert. denied, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). Consequently, if this was the usual case of discriminatory employment practices, it is likely that an injunction would not only be appropriate, but, indeed, such a result would be mandated. Pan American's acquisition of National subsequent to the Florida district

court opinion, however, removes this action from the category of ordinary cases. Rather than relying upon cases interpreting the Title VII remedial provisions, the acquisition necessitates our focus on the current conflict between the decisions rendered by the Florida and California district courts in terms of successor liability.[4]

The Supreme Court has addressed the question whether a corporation that takes the place of another corporation through merger, acquisition or otherwise (a "successor corporation") should be held liable

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4. As the former Fifth Circuit stated in the related context of successor liability in labor law disputes, "[w]e are in essence called upon to pragmatize the corporate and labor relationships to determine whether the past is part of the present, or the present the beginning of tommorow." Boeing Co. v. International Ass'n of Machinists and Aerospace Workers, 504 F.2d 307, 317 (5th Cir. 1974, cert. denied, 421 U.S. 913, 95 S.Ct. 1570, 43 L.Ed.2d 779 (1975).

for unfair labor practices of its predecessor, should be bound by labor contracts between the predecessor and its employees, or, instead, should not be affected by the labor relationships of its predecessor. See Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974); Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973); NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). A review of these cases indicates that the Court balances the interests of the employees and the employer and labor law policy generally. See, e.g., Howard Johnson Co., 417 U.S. at 262, n. 9, 94 S.Ct. at 2243, n. 9, 41 L.Ed.2d at 56-57, n. 9. Such factors

as the extent to which the successor corporation essentially continues the operations of the former corporation and whether the new corporation had notice of the former corporation's practices and policies are also a part of this inquiry. See, e.g., Golden State Bottling Co., 414 U.S. at 171-174, 94 S.Ct. at 418-420, 38 L.Ed.2d at 395-397. See also, Boeing Co. v. International Association of Machinists and Aerospace Workers, 504 F.2d 307 (5th Cir. 1974), cert. denied, 421 U.S. 913, S.Ct. 1570, 43 L.Ed.2d 779 (1975). Of greater importance, however, is the Court's pronouncement that the test for successor liability is fact specific and must be conducted "in light of the facts of each case and the particular legal obligation which is at issue." 417 U.S. at 262, n. 9, 94 S.Ct. at 2243, n. 9, 41 L.Ed.2d at 56-57, n. 9. Thus, the Court emphasized that:

> [t]here is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.

Id.

Although the former Fifth Circuit Court of Appeals and this court have not considered whether the successor liability doctrines enunciated by the Supreme Court in a labor law setting should be applicable to Title VII successor problems, other courts which have examined this question have answered it in the affirmative. See, e.g., EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974). MacMillan was the first case to scrutinize successor liability in the area of employment discrimination. Reviewing the labor law successor liability cases discussed above, the Sixth Circuit found that the logic of those cases was equally compelling in Title VII litigation. Many other courts

have adopted the MacMillan approach. See Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union, Local 64, 674 F.2d 732 (8th Cir. 1982); EEOC v. Sage Realty Corp., 507 F.Supp. 599 (S.D.N.Y. 1981); Burt v. Ramada Inn of Oxford Mississippi, 507 F.Supp. 336 (N.D.Miss. 1980); Brown v. Evening News Association, 473 F.Supp. 1242 (E.D.Mich. 1979); Escamilla v. Mosher Steel Company, 386 F.Supp. 101 (S.D.Tex. 1975). We agree that the balancing of interests, fact specific analysis employed by the Supreme Court in labor law successor cases is the proper method for determining whether a successor employer should be bound by the Title VII transgressions charged against its predecessor.

Having concluded that the balancing test is appropriate, we turn to the highly unusual facts of this case. Not only has National been acquired by an airline with a

maternity leave policy at odds with one found acceptable by the Florida district court, but Pan American's leave plan was adjudged to be in compliance with Title VII by other courts. Under these particular circumstances, the balance strikes against enjoining Pam American from continuing its policy. In making this judgment, we recognize that the former National attendants have a legitimate interest in working under discrimination-free conditions and are sympathetic with their attempt to realize the benefit of the decision they obtained against National in the Florida district court, but the difficult facts in this case prompt this result.

Pam American successfully defended its policy against a Title VII challenge and has fully integrated former National attendants into its operations. It has a legitimate interest in treating its employees in an even-handed manner. Although the

former National attendants argue that the policy approved by the Florida court could be adapted exclusively to the domestic routes comparable to National's former flight system while allowing Pan American to continue its practice validated by the California court on international flights, we are not persuaded that this would be a practical solution. Fashioning a remedy in that manner would work against Pan American's efforts to consolidate its flight attendant system on a route-wide basis. The National attendants' claim that the district court decisions do not conflict because of the differences in the routes of the former airlines is not supported by the opinions in either case. The Florida district court specifically said that National operated flights from Miami to London and that "[m]ost of National's routes involve flying over water." 434 F.Supp. at 259. Neither court limited its

holding to maternity leave policies of particular flights or types of carriers. As an appellate court, we are not now in a position to find that safety concerns justify the policies on international routes but not on domestic routes.

In conclusion, we emphasize that successor liability balancing is a highly fact oriented task. We find only that in light of the particular facts in this case, the district court did not abuse its discretion in denying injunctive relief against Pan American.[5]

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5. The district court found that Pan American would be liable as National's successor for money damages arising from the National lawsuit. Pan American did not contest this finding on appeal and, therefore, we do not consider it. However, we note that the Supreme Court has stated that a corporation may be a successor for some purposes but not for others. Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974). This reasoning would support the district court's decision on this issue. Cf. Howard v. Penn Central Transportation Co., 87 F.R.D. 342 (N.D.

For the foregoing reasons, the decisions of the district court is

AFFIRMED.

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(Footnote 5 continued)

Ohio 1980) (Conrail, as Penn Central's successor, could be required to reinstate or promote an employee who suffered discrimination while in Penn Central's employ but would not be liable as a successor for damages arising from Penn Central's employment practices because Conrail was organized to alleviate the financial troubles of the rail system).

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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[Filed
Apr 20, 1983]

No. 82-5376

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D.C. DOCKET NO. MDL-218
75-1968-CIV
75-719-CIV-NCR

IN RE: NATIONAL AIRLINES, INC.,
MATERNITY LEAVE PRACTICES
AND FLIGHT ATTENDANT WEIGHT
PROGRAM LITIGATION.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Florida

- - - - - - - - - - - - -

Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby AFFIRMED:

It is further ordered that appellant pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 17, 1983

ISSUED AS MANDATE:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. MDL 218
75-1968-Civ-NCR
75-719-Civ-NCR

IN RE: NATIONAL AIRLINES
LITIGATION:

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THIS CAUSE is before the court on plaintiff's motion requesting that the court enter an injunction against Pan American Airlines requiring Pan American to conform its maternity leave policies to the prior ruling of this court. After consideration of the memoranda supplied to the court, the entire record, and existing case law it is:

ORDERED AND ADJUDGED that plaintiffs' request for injunctive relief is denied.

The court finds that the doctrine of successor liability as developed in the labor law context is appropriate to remedy violations of the employment discrimination

laws. Accord, Forde v. Kee Lox Manufacturing Co., 584 F.2d 4 (2d Cir. 1978); Slack v. Havens, 522 F.2d 1901 (9th Cir. 1975); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974). Furthermore, the court finds that application of the factors set forth in EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974) supports a finding that Pan American, as the successor of National Airlines, is liable to remedy National's violations of the employment discrimination laws. Successor liability, however, requires that the court balance the interests of the employees, the successor and the public to arrive at not only a complete remedy but one that is appropriate under the facts of each individual case. Golden State Bottling Co., Inc. v. NLRB., 414 U.S. 168, 181 (1973). Consideration of the facts in this case, including the fact that the Ninth Circuit has considered the

maternity leave policies of Pan American Airlines, indicate to this court that the injunction described above is not appropriate.

The extent and nature of the liability to be imposed upon Pan American will be specified by further order of this court.

DONE AND ORDERED this 24 dau [sic] of Feb., 1982.

/s/
UNITED STATES DISTRICT JUDGE

In re NATIONAL AIRLINES, INC.,
Maternity Leave Practices and Flight
Attendant Weight Program Litigation.

Barbara Ann GARDNER et al.,
Plaintiffs,
v.
NATIONAL AIRLINES, INC., Defendant.

Susan Gail LEONARD, Plaintiff,
v.
NATIONAL AIRLINES, INC., and Air
Line Pilots Association International,
Defendants.

MDL No. 218, No. 75-1968-Civ-NCR and
No. 75-719-Civ-NCR.

United States District Court,
S.D. Florida.
May 17, 1977.

MEMORANDUM OPINION

ROETTGER, District Judge.

A series of lawsuits alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq., were instituted by female ground employees and flight cabin attendants against National Airlines, Inc. and its flight attendants' collective bargaining representative. They were

consolidated in this court by order of the Judicial Panel on Multidistrict Litigation entered on August 29, 1975, pursuant to 28 U.S.C. § 1407. In re National Airlines, Inc. Maternity Leave Practices and Weight Program Litigation, 399 F.Supp. 1405 (Jud.Pan.Mult.Lit. 1975).

Inasmuch as the mandatory maternity leave policies of all the trunk airlines except Northwest are the same, these issues could have been decided before one United States District Judge. The court has discovered that similar lawsuits are pending against Eastern Airlines, Western Airlines and Pan American World Airways. Perhaps this court, or others, or the parties, have been remiss in not bringing these matters to the attention of the Judicial Panel on Multidistrict Litigation. However, at this stage of the instant case the suggestion is a bit tardy. The testimony revealed that many of the medical

experts for plaintiffs or defendants have testified in these similar lawsuits pending in various districts. Such cases could have been consolidated for pretrial matters under 28 U.S.C. § 1407. In re Japanese Electronic Products Antitrust Litigation, 388 F.Supp. 565 (Jud.Pan.Mult.Lit. 1975); In re Gypsum Wallboard, 303 F.Supp. 510 (Jud.Pan.Mult.Lit. 1969). The transferee judge could have considered whether transfer for trial under 28 U.S.C. § 1404 would have been appropriate. Even if pretrial matters only were handled in one district, the use of a single video-tape deposition for each medical expert would have been beneficial.

The result of such similar litigation being tried in various district courts may well be a divergence of decisions, which not only will affect the litigants but until higher courts have achieved some

uniformity, will also leave flight attendants, ground employees and employer airlines which are not parties to these cases in some doubt as to what their policy should be. Of course, there is always the risk that such uniformity may not occur. Last but not least, the unnecessary duplication of judicial effort has been substantial.

This trial involves the controversy over National's maternity leave policy with respect to its "stop-start" provisions; that is, when does a pregnant flight attendant have to stop flying and when must she resume her duties following the birth of her child? Other maternity leave issues have been stayed pending resolution by the Supreme Court of the United States of two cases which present similar issues.[1]

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1. Satty v. Nashville Gas Company, 522 F.2d 850 (6th Cir. 1975), cert. granted, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788

Another segment of these consolidated actions, challenging defendant's height-weight limitation policy has been resolved by separate decision. Leonard v. National Airlines, Inc., 434 F.Supp. 269 (S.D.Fla. 1977).

On July 15, 1976, this court certified the maternity issue as a class action, pursuant to Rule 23(b)(2), Fed.R.Civ.P. and defined the class as follows:

> "Female personnel who have been employed by National Airlines, Inc. on or after January 29, 1972, or who may become so employed in the future, divided into a subclass of female flight cabin attendants represented by Susan Gail Leonard and Marilyn White, and a subclass of non-flying female employees represented by Barbara Ann Gardner and Sherry Knipple."

At the same time the court ordered that the case of Barbara Ann Gardner, et al. v.

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(Footnote 1 continued)

(1977); Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir. 1975), cert. granted, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977).

National Airlines, Inc., et al., 75-1968-Civ-NCR, be transferred for trial to the Southern District of Florida from the Eastern District of Virginia, pursuant to 28 U.S.C. § 1404.

National Airlines is one of the smaller of the trunk carriers in the United States, employing approximately 1225 female flight attendants and 75 male flight attendants. National employed its first male flight attendant, or steward,[2] on April 6, 1973. Twenty is the minimum age for flight attendants at National and 91% are 33 years of age or under. Over half of them fall in the age group from 25 to 30.

In 1967, National entered into a collective bargaining agreement with the

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2. For the sake of brevity, the terms "male flight attendant" and "female flight attendant" are used interchangeably with "steward" and "stewardess".

Airline Pilots Association (ALPA),[3] a labor organization then representing its flight cabin attendants, and included in the agreement a contract provision regarding marriage and pregnancy. This section provided as follows:

> "Effective July 10, 1967, marriage shall not disqualify a stewardess from continuing her flight duties except as otherwise provided below.
>
> 1.All married stewardesses in the employ of the Company subsequent to that date must, on penalty of discharge without recourse, immediately advise the Company of their marital status (including subsequent divorce.)
>
> 2.On knowing she is pregnant, a stewardess must resign or be discharged without recourse."

In February of 1971, the airline and the Union entered into a letter of agreement which modified the maternity

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3. On August 18, 1976, ALPA was replaced by the Transport Workers Union (TWU) as the flight attendants' certified bargaining agent. TWU has been joined as a party defendant and ALPA remains as a party defendant.

termination provision.[4] This modification, which is National's current policy, requires a flight attendant to notify the company in writing as soon as she becomes aware she is pregnant. The flight attendant is immediately placed on unpaid maternity leave. The policy also requires a flight attendant to return to work within 60 days following the birth of her child. Failure to comply with either the notice requirement or the return to work requirement results in termination of employment.

If a flight attendant is unable to return to work within 60 days and timely notifies the company, supported by medical justification from her personal physician, she may request an extension of her leave to a maximum of six months after delivery.

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4. Some of the interesting background accompanying National's change of policy is detailed in Johnson v. National Airlines, Inc., 434 F.Supp. 266, 267-268 (S.D.Fla. 1977).

While in theory extensions are subject to the approval of National's medical examiner, the testimony was uncontradicted that timely requests for extension are automatically granted.

The maternity leave policy covering non-flying personnel employed by National Airlines is different from the one previously described for stewardesses. Non-flying employees are subject to their being placed on unpaid maternity leave at the end of their fifth month of pregnancy. From 1970 to 1975, station employees were required to commence their leave not later than the end of the seventh month of pregnancy.

In 1975, National entered into letters of agreement with the Communications Workers of America, representing the radio and teletype operators and the Air Line Employees Association, International,

representing the station employees,[5] which modified the policy. The current policy permits the employee to work past the end of her fifth month if written notice of pregnancy is provided the company and if the employee's personal physician certifies, on a monthly basis, her continued ability to work. This provision is contingent upon the determination by an employee's supervisor that she is capable of continuing her job.

The agreement requires non-flying employees to return to work within 60 days following the birth of her child. It has been National's practice to allow its non-flying employees to extend this return period through the use of personal leave. Personal leaves for non-pregnancy-related

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5. Neither of these unions are parties to the lawsuit.

medical disabilities may be extended to a maximum of three years, whether the employee is a flight attendant or non-flying.

Barbara Ann Gardner was employed as a clerical ground employee by National Airlines in 1970. In 1972, she became pregnant and in July of that year she suffered a miscarriage. She underwent minor surgery as a result of her miscarriage and after a period of bed rest returned to work.[6]

Sherry Knipple was employed by National Airlines in 1967 as a stenographer. When she became pregnant in 1972, she informed National of her pregnancy. Also submitted to National was a statement from

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6. Ms. Gardner seeks payment of sick pay for the period during which she was absent from work. Although this claim has been severed and stayed, see note 1, supra, she may still act as class representative. See Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974).

her personal physician estimating her date of delivery. Upon receipt of these documents, National's industrial nurse informed Ms. Knipple and her supervisor that Ms. Knipple would not be permitted to work past the end of her seventh month of pregnancy.

Marilyn White was employed by National in 1963 as a flight cabin attendant. In March of 1973, Ms. White orally informed National that she was pregnant. Two weeks later Ms. White's personal physician submitted a written statement confirming the pregnancy and estimating the date of delivery as July 22, 1973. Ms. White was approximately at the beginning of the sixth month of her pregnancy when she informed National and pursuant to its policy National discharged Ms. White on April 12, 1973, one day after receiving her physician's written statement.

Susan Gail Leonard was employed by National in 1968 as a flight cabin attendant. In August of 1972, Ms. Leonard went on sick leave and while on leave discovered that she was pregnant. Thereafter she awaited the birth of her child on unpaid maternity leave. Her child was born on April 13, 1973. On July 1, 1983, Ms. Leonard wrote to National requesting an extension of her maternity leave. National's then Director of Flight Attendants subsequently advised Ms. Leonard that her letter was not received until July 5. Because she had failed to return to work nor notify the company within 60 days following the birth of her child, pursuant to the policy, she was terminated at once.[7]

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7. Other aspects of Ms. Leonard's termination are set out in Leonard v. National Airlines, Inc., 434 F.Supp. 269, 272 & n.5 (S.D.Fla 1977).

This court previously concluded that plaintiffs Gardner, White and Leonard each filed her charge of discrimination within the 180 day period following the occurrence of the allegedly discriminatory act. 42 U.S.C. § 2000e-5(e). Likewise, the complaints herein were each filed within 90 days after receipt by plaintiffs Gardner, White and Leonard, of notice of right to sue. 42 U.S.C. § 2000e-5(f). Plaintiff Knipple never filed a charge of discrimination with the Equal Employment Opportunity Commission (E.E.O.C.). Although she is precluded from suing on her own behalf, Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970), she may stand as class representative, within the periphery of the E.E.O.C. claim filed by her co-plaintiffs, for an appropriate subclass. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

It is undisputed that defendant National Airlines, Inc. is an "employer" as defined in 42 U.S.C. § 2000e(b), and that ALPA and TWU are "labor organizations" within the meaning of 42 U.S.C. § 2000e(c). Plaintiffs have alleged that National's maternity policy violated 42 U.S.C. § 2000e-2(a)(1),(2) and that the collective bargaining agreement to which the Unions were parties violates 42 U.S.C. § 2000e-2 (c)(3).

There are two main issues of law which must be resolved by any court faced with an employment policy asserted to violate Title VII. First, the court must determine whether plaintiffs have sustained their burden of proving a violation of Section 703(a), 42 U.S.C. § 2000e-2(a). If, and only if, that burden has been met, may the court reach the second issue: whether the defendant has proved its policy constitutes

a bona fide occupational qualification, as defined in Section 703(e), 42 U.S.C. § 2000e-2(e).

Prior to General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the Court of Appeals which addressed the issue had unanimously held that discrimination based upon pregnancy was discrimination based upon sex. See Communications Workers of America v. A.T.&T. Co., 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975), vacated on juris. grounds 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir. 1975); cf. Tyler v. Vickery, 517 F.2d 1089,

1097-99 (5th Cir. 1975).[8] In Gilbert, the Supreme Court held that every distinction based on pregnancy is "not in itself discrimination based on sex." General Electric Co. v. Gilbert, supra, 429 U.S. at 133-139, 97 S.Ct. at 407-10. It is this court's task then to determine whether National's maternity leave policy is discrimination based on sex.

Gilbert was decided two years after Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974), and relied substantially on its reasoning. See General Electric Co. v. Gilbert, supra, 429 U.S. at 133-139, 97 S.Ct. at 407-10. Geduldig involved the equal protection clause rather than Title VII. Both cases

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8. Petitions for certiorari were granted in Satty and Berg, see note 1, supra. The decision in Communications Workers was vacated in light of Gilbert, 429 U.S. 1033, 97 S.Ct. 724, 50 L.Ed.2d 744 (1977).

involved a challenge to disability insurance programs which excluded pregnancy as one of the covered risks. Because the coverage afforded by the disability insurance was extended equally to male and female employees, the Court concluded:

> "'There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'"

General Electric Co. v. Gilbert, supra at 135, 97 S.Ct. at 408 (quoting from Geduldig v. Aiello, supra 417 U.S. at 496-97, 94 S.Ct. 2485). In substance, Gilbert held that under-inclusiveness does not amount to discrimination. Id. 429 U.S. at 133, 97 S.Ct. at 407. The issue in the instant case is one of unequal inclusiveness.

In Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), decided earlier in the same term as Geduldig, the Supreme Court addressed the issue of mandatory

maternity leaves. The Court in LaFleur held that requiring a woman to begin maternity leave at a predetermined point in her pregnancy, without regard to her individual ability to work, constituted a violation of the due process clause of the fourteenth amendment.[9] Id. at 647-48, 94 S.Ct. 791. The Court took pains to observe that Title VII was inapplicable to governmental employers at the time the complaints involved in LaFleur were filed.[10] Id. at 638-39 n. 8, 94 S.Ct. 791.

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9. LaFleur was brought as a § 1983 action in the District Courts. Both of those courts and the Court of Appeals premised their rulings on the equal protection clause rather than the due process clause.

10. The Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103, extended Title VII coverage to governmental employees, but did not become effective until March 24, 1972.

The Supreme Court, as previously noted, has granted certiorari in two cases which present, inter alia, the issue before this court. Presumably, if Gilbert were dispositive of the issue, the Court would have vacated and remanded as it did with Communications Workers, supra. Moreover, Geduldig left the door open to show that an otherwise valid classification based upon pregnancy was merely a pretext for gender-based discrimination. Geduldig v. Aiello, supra 417 U.S. at 496-97 n. 20, 94 S.Ct. 2485. Gilbert iterated that view and added that a showing under Title VII of the gender-based effect of a pregnancy policy would sufficiently meet the required burden of proof. General Electric v. Gilbert, supra 429 U.S. at 135-137 & nn. 14 & 15, 97 S.Ct. at 408-09.

This court, in deciding whether Gilbert is to be an absolute bar to plaintiffs' recovery, has considered the

E.E.O.C. guidelines asserted to support plaintiffs' position. 29 C.F.R. § 1604.10(a) provided in pertinent part:

> "(a) A written . . . employment policy or practice which excludes from employment . . . employees because of pregnancy is in prima facie violation of Title VII."

It is clear that such guidelines are not to be considered in the same vein as Congressional authorized regulations which have the force of law. General Electric Co. v. Gilbert, supra at 141, 97 S.Ct. at 411. They are, however, entitled to some consideration in determining legislative intent. Id.

The Supreme Court heavily discounted the guidelines in Gilbert for two reasons. First, they conflicted with the regulations promulgated by the Wage and Hour Administrator under the Equal Pay Act. Where the issue of compensation is contested in Title VII claim, the provisions of the Equal Pay Act, 29 U.S.C. § 206(d), are controlling.

42 U.S.C. § 2000e-2(h). This ground is inapplicable in the instant case.[11]

The second reason for heavily discounting the guidelines was the late date of its promulgation as well as its conflict with a previous pronouncement of the E.E.O.C. General Electric Co. v. Gilbert, supra at 147, 97 S.Ct. at 414. However, while not promulgated contemporaneously with the enactment of Title VII, the guidelines were promulgated shortly after the enactment of the Equal Employment Opportunity Act of 1972, which amended Title VII. See Cleveland Board of Education v. LaFleur, supra 414 U.S. at 638-39 n. 8, 94 S.Ct. 791. In the report accompanying H.R. 1746, the bill eventually

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11. The issue of maternity benefits has been stayed. See note 1, supra. Moreover, the guideline involved in Gilbert was 29 C.F.R. § 1604.10(b), which is a different subsection than is presented here.

enacted after conference, the following enlightening observations were made:

> "Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. . . .
>
> "Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964. . . .
>
> ". . . [D]iscrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable."

H.Rep. 92-238, 92d Cong., 2d Session. (Reprinted at 2 U.S.Code, Cong. and Administrative News, pp. 2140-41 (1972). Thus, to the extent that the 1972 amendments to Title VII are viewed as a reaffirmation of Congressional purpose in the area of eliminating sex discrimination, the E.E.O.C. guidelines promulgated as 29 C.F.R. § 1604.10(a) are relevant, timely, and entitled to greater weight than was accorded the guideline in issue in Gilbert.

Finally, the court must consider the weight to be accorded LeFleur. Although not a Title VII case, its holding must be relevant to the issue before this court. If the Supreme Court were to hold in Satty and Berg that Title VII does not reach the issue of mandatory maternity leaves, an anomalous situation would result. Last term in Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Court held that constitutional standards were not the same as those of Title VII. Id. at 238, 96 S.Ct. at 2047. The clear import was that the standards employed in Title VII are less restrictive. Ibid. Thus, to hold that mandatory maternity leave requirements, without regard to individual ability to work, does not create a prima facie case under Title VII would result in the constitutional standard promulgated in LaFleur being less restrictive than the one in Title VII.

The court must conclude that resolution of the issue before it is not per se foreclosed by Gilbert. Therefore, the court now proceeds to determine whether plaintiffs have met their required burden under Section 703(a). Very little testimony was directed to a showing of prima facie discrimination. Gilbert having foreclosed the contention that pregnancy per se is equivalent to sex per se, the hurdle remains for plaintiffs to demonstrate that National's policy has an impact which falls more heavily upon females.

The court starts with the principle that employment is a protected interest, see Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Carey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1974), as is the decision to bear children. LaFleur v. Cleveland Board of Education, supra. Since April 6,

1973, both male and female flight attendants have been employed by National. Each is subject to equivalent terms and conditions of employment, see Leonard v. National Airlines, Inc., 434 F.Supp. 269 (S.D. Fla. 1977), with one exception--females suffering from the "disability" of pregnancy must cease working. Thus, National's policy deprives females of their means of support during pregnancy.

Evidence was produced that females have both the capacity and desire to work during their pregnancy. Two of defendant's flight attendants testified about their experiences while on maternity leave. One, Ms. Maiorino, a flight attendant for seven years, became pregnant in 1973. When she discovered her pregnancy--during her fifth month--she notified National and went on leave. Ms. Maiorino testified that she had no difficulties in performing her duties while pregnant, although she may have taken

one to three sick days during that period. Ms. Maiorino sometimes suffers from fluid in her ears and when that occurs, she calls in sick until medication relieves the problem. However, she makes the determination whether she will fly.

Ms. Olhausen has been a flight attendant with National for 11 years. She became pregnant in 1973, working until the end of her fourth month (16-17 weeks). She went on leave at that time because she was beginning to show and was afraid of being terminated. While on leave she worked at her husband's restaurant; the implication drawn from Ms. Olhausen's testimony was that she worked in the restaurant because her family needed her income. When she went on leave and her income ceased, her husband could not afford to hire someone to do the work she would do. It is this economic factor which distinguishes this case from Gilbert.

Under National's policy, when a female flight attendant knows she is pregnant she must cease working, terminating her income. There is no other condition which automatically results in such deprivation. Because pregnancy is an exclusively female condition, the policy inevitably has a disproportionate impact on females. Gilbert was, at least in part, premised on the position that General Electric need not have provided any disability package. General Electric Co. v. Gilbert, supra at 140, n. 18, 97 S.Ct. at 410. Without the employment of flight attendants, National cannot operate. 14 C.F.R. § 121.391(a). This is not the only impact of the policy, however, which falls disproportionately upon females.

Although it is only those females who become pregnant who are overtly affected by the operation of this policy, all females are potential victims of this

policy. Private Title VII suits are designed to attack the policy, not just its individual effects. See Oatis v. Crown Zellerbach Corp., supra. Females generally have the capacity to become pregnant and give birth to a child. National's policy impinges upon this choice.

The Supreme Court, in a growing line of cases, has held that this decision is fundamental and one reserved exclusively for the mother. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); Cleveland Board of Education v. LaFleur, supra; Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). As noted previously, the Court condemned a similar policy in LaFleur for restricting this right. Although LaFleur was decided on due process grounds, which is inapplicable to private employers, the court considers

this to be a distinction without a difference. To the extent that Congress intended to abolish all employment practices which impact more heavily upon females than males, LaFleur suggests that absent a legitimate government interest (or BFOQ in Title VII scheme) National's policy cannot stand. The fact that National did not intend its policy to discriminate against females is immaterial. Griggs v. Duke Power Co., supra.

The court concludes that defendant's policy discriminates against females in violation of Title VII. Although the evidence was not overwhelming, it seems clear that many flight attendants are capable of working during pregnancy and some need the income from their employment. There may be some stewardesses who delay their attempt to become pregnant because they cannot afford to go without work for six to eight months. Finally, no other

physical condition is treated by National as per se disqualifying although the other disqualifying conditions are medical disabilities.

Before proceeding to National's BFOQ defense the court deems it necessary to make a number of observations. First, the policy in question does not have a neutral characteristic upon which disqualification is based ("sex plus" discrimination). See Phillips v. Martin Marietta Corp., 400 U.S. 542, 90 S.Ct. 496, 27 L.Ed.2d 613 (1971). Pregnancy is inevitably sex-linked. Secondly, although pregnancy may be the result of a voluntary act, only the female participant must suffer the consequences under National's policy. Finally, although the evidence at trial was specifically directed towards the policy affecting flight attendants, the conclusions set forth above apply equally to the non-flying subclass.

BONA FIDE OCCUPATIONAL
QUALIFICATIONS DEFENSE

National asserted that its policy was justifiable as a BFOQ defense on a number of bases: that a stewardess who continues to fly while pregnant is potentially dangerous to the safety of (a) passengers, (b) the fetus, and (c) the flight attendant herself. The court in this opinion will only consider the defense as it relates to the safety of passengers. There has been no evidentiary showing that flying while pregnant is dangerous to the health of a stewardess.

Although there has been some testimony presented by National that pregnant flight attendants continuing to fly causes an increase in the number of spontaneous abortions as well as defective babies, the evidence is in conflict. Apparently, data compiled on Western Airlines' flight attendants indicates an increase in the

spontaneous abortion rate and other complications, but that data is still incomplete. The experience of Northwest Airlines after having permitted pregnant flight attendants to fly for nearly four years, as well as other testimony of no fetal anomalies despite 2500 pregnant stewardesses a year, supports a finding that no fetal anomalies have resulted from pregnant stewardesses continuing to work. In addition, the court considers that the question of harm to the fetus is basically a decision to be made not by this court, but by the mother of the fetus. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), aff'd sub nom. Gerstein v. Coe, 428 U.S. 901, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976).

The F.A.A. requires that a plane be evacuated of passengers in 90 seconds. 14 C.F.R. § 25.803(c). The bulk of the flight attendants' training prior to beginning flight duties is devoted to safety techniques. See 14 C.F.R. § 121.421. At least once a year recurrent training is required of all flight attendants and 100% of that time is devoted to a review and up-dating of safety techniques. 14 C.F.R. § 221.427-(b)(3). National did not require agility drills of its flight attendants until recently. It now requires timed agility drills, including the giving of voice commands, opening the forward cabin door and deploying the escape chute.

Most of National's routes involve flying over water, more so than most of the trunk carriers in the United States. In addition to the Miami-London run, the Miami, Ft. Lauderdale, or West Palm Beach flights to Washington, New York or Boston

all involve considerable distances over water as do the flights from Florida across the Gulf to New Orleans, Houston and on to Los Angeles or San Francisco.

By stipulation, the court and counsel inspected a DC-10, viewing the safety equipment aboard as well as the working spaces provided for flight attendants. A Boeing 727 was also inspected. These are the only two aircraft types being operated by National at this time.[12] The court had the opportunity while aboard the 727 to remove the window exit, open the front cabin door and inflate the emergency slide as well as leave the plane by that route.

The life raft on a 727 weighs 130 pounds and it requires 70 to 100 pounds of force to open the 727's door. In the DC-10 the cart weighs 200 pounds when loaded; the

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12. National flies two variations of each plane: DC-10-10 and DC-10-30 and both the 727-35 and 727-235.

galley in the DC-10 is below the main cabin deck and has a narrow escape hatch up a ladder leading to a main deck aisleway. The court must conclude that the hatch requires both agility and trim girls to make a quick exit.[13]

Defendant insists that a pregnant flight attendant would not be able to perform her safety functions as effectively in the event of emergencies. Plaintiffs concede that such would be a bona fide occupation qualification if true, but strongly dispute that contention. Much of the evidence was directed to this question and the parties called eminent physicians to testify.

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13. During nearly three years of active duty in the Navy and some twenty additional years of midshipman and Naval Reserve cruises, the court has made many ascents and descents through various hatches on different types of ships. Only two that were more difficult to navigate come to mind and neither of them presented such close quarters.

The consensus of plaintiffs' medical experts[14] is that if a flight attendant could perform safety tasks before pregnancy, she could do so while pregnant, at least during the first trimester (thirteen weeks) and after that it would be an individual matter.

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14. In order of appearance:
Dr. Jack Pritchard is Professor of Obstetrics at the University of Texas--Southwestern Medical School and Chief of Obstetrics at Parkland Hospital in Dallas; his major research area is hematology and he is the senior editor of the text, Williams on Obstetrics;
Dr. Earl T. Carter is Chairman of the Division of Preventive Medicine at Mayo Clinic and medical director for Northwest Airlines since 1967;
Dr. Andre Helegar is Professor of Obstetrics at Georgetown with two years' study in aviation medicine at the University of Paris;
Dr. Robert Creasy, a doctor from San Francisco, teaches obstetrics at the University of California and specializes in fetal and maternal physiology at the Cardiovascular Research Institute.
Dr. Helegar did a special study in Peru on the effect of high altitude on pregnant women and llamas and Dr. Creasy prepared a master's thesis on the effects of high altitude on sheep.

A staff meeting of the obstetricians at Mayo Clinic produced the following conclusions: All saw no reason why stewardesses could not fly during the first trimester but felt it was not advisable to permit her to fly during the last trimester. This conclusion was based on her ability to work; no concern was expressed about the fetus. They concluded that eventually the flight attendant will have some abdominal distention and when this reaches 6 to 8 inches it will be difficult for her to lift or push, but such a determination should be on an individual basis.

The final consensus reached by Mayo's staff was that a pregnant flight attendant could fly in the first trimester, it's an individual matter in the second, and none of the stewardesses should fly during the final trimester. Dr. Carter, Northwest's medical director proposed the consensus be adopted as Northwest's policy. Northwest

did so in 1973 and it is the only trunk carrier in the United States to have done so. During the second trimester a Northwest stewardess who wants to fly submits a monthly statement from her doctor that she is fit for duty. Nearly all of the Northwest stewardesses leave after 3-1/2 to 4 months of pregnancy--some stay on who apparently need the income. There is no evidence that the policy at Northwest has resulted in more injuries.

The longest run in Northwest's system, block to block, is 11 hours (Seattle to Tokyo). There have been no complaints at Northwest with respect to the performance of pregnant flight attendants and there have been no miscarriages while on duty. Northwest tries to limit the number of pregnant stewardesses on any one flight so that there is not more than one per flight.

Northwest stewardesses have also adopted maternity uniforms which Dr. Carter

opposes. His conclusion is that if a flight attendant has to use one, it is because her abdominal strength has relaxed to the point she should stop flying until after the delivery of her child.

Much testimony dealt with the fact that the artificial environment in aircraft cabins is maintained at an altitude of 6,000 to 7,000 feet. The altitude factor produced the sharpest conflict in the medical testimony. Although the court found the testimony of medical experts extremely interesting on the effect of altitude on pregnant women, animals and their offspring,[15] it does not feel compelled to decide between the conflicting conclusions of medical experts. The key question posed by the issue of cabin

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15. As indicated earlier, the court does not consider the effect on the fetus as material to the issues of BFOQ.

altitude is whether it adversely affects the work performance of flight attendants so that her capability to discharge her safety responsibilities is impaired.

MEDICAL EVIDENCE PRESENTED
BY NATIONAL

The consensus of defendant's experts[16] from their observations or treatment of stewardesses indicate many complaints of swollen feet and fatigue on long runs, even

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16. Dr. William Cooper, Clinical Professor of Obstetrics at George Washington, described himself as a practicing obstetrician rather than a research obstetrician; Dr. William H. Whaley, an internist and clinical faculty member in internal medicine and hematology at Emory, is a medical consultant for at least six airlines; Dr. William Winter, formerly an obstetrician, currently is director of the medical research program for NASA, and has studied 71 commercial air crashes as well as serving on the boards investigating military crashes; he previously taught at the school of aviation medicine at Pensacola and evaluated 34 female applicants for the ten finalists for the aerospace program; and
Dr. Fred Hemming is assistant director of medical services of Canadian Pacific Airlines, an airline which is required by Canadian law to permit pregnant flight attendants to continue working.

when not pregnant; that they have more complaints of backaches and swollen feet than do, for example, schoolteachers; that it is a vigorous occupation and a number of the dysfunctions of pregnancy, such as nausea, edema, urinary frequency, tiredness or fatigue, and varicosity, are all incompatible with the duties of flight attendants; and that the work efficiency of pregnant women is less.

The court expressed its concern during the trial about the lack of evidence on the question of the metabolic costs of pregnancy on stewardesses. Some evidence from a study indicated that a waitress' metabolic costs were equal to that of an assembly line worker and greater than someone doing standing work such as a carpenter. Flight attendants do more than merely serve food and beverages; therefore the metabolic costs of those duties could affect their capability for safety-related duties.

National attached pedometers to a number of its flight attendants prior to the next taking of evidence and the readings varied from 4/10ths of a mile with a light load from Miami to LaGuardia to 3.2 miles in coach on a half-full flight from London to Miami.[17] The court was somewhat surprised that the distances were not longer because the court can take judicial notice that on many flights, especially short dinner flights, the flight attendants are working at a fast, at times almost frantic, pace.

National's longest run is the 9 hour flight from London to Miami and the longest on-duty flight is 11 hours and 55 minutes, with the longest stop being 35 minutes. One 3-day-trip has 19 landings and one 4-day-trip has 22 landings. The pedometer

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17. Not surprisingly, the pedometer reading was about one-third as much in first-class.

readings on these multiple landing trips approximated or exceeded the miles walked on the long non-stop flights.

## THE TEST FOR BFOQ AS TO FLIGHT ATTENDANTS

The hurdles which must be cleared by National before it can discharge its burden of establishing a BFOQ are contained in a series of Fifth Circuit cases. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

The sequential hurdles are outlined in Usery. Initially, the Diaz test must be satisfied:

> "Diaz mandates that the job qualifications which the employer invokes to justify his discrimination must be reasonably necessary to the essence of his business--here, the safe transportation of bus passengers from one point to another. The greater the safety factor, measured

> by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving." 531 F.2d at 236.

If National can pass muster under Diaz then the Weeks two-prong test must be met:

> "whether it had reasonable cause, that is, a factual basis, for believing that all or substantially all [female flight attendants who achieved certain states of pregnancy] would be unable to perform safely and efficiently the duties of the job involved, or whether it is impossible or impractical to deal with [such persons] on an individual basis." [Modified from the question set forth in Usery to fit this case.] Id. at 236.

The court amplified what it meant by unreasonable job qualifications in the light of the safety risk in the following footnote in Usery:

> "We believe that courts must afford employers substantial--though not absolute--discretion in selecting specific safety standards and in judging their reasonableness." Id. at 236, n.30.

The court discussed the significance of safety of passengers and members of the public in Usery and indicated that:

> ". . . [t]he employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must, of course, show a reasonable basis for its assessment of risk of injury/death". Id. at 238.

Having determined that the plaintiffs have made a prima facie case of discrimination under Title VII, this court must determine whether National has established its defense of BFOQ for maintaining its current policy of requiring that a stewardess stop flying as soon as she knows she is pregnant. If the court determines that the present policy is not justified as BFOQ, then the court must determine from the evidence at what stage of pregnancy, if any, may a policy requiring suspension of employment of flight attendants and ground personnel respectively be enforced or

should it be determined on an individual basis, or whether some combination of these factors is appropriate. Finally the court must determine if there is any justifiable BFOQ for National's "start" provision under its "stop-start" maternity leave policy.

National's present policy has produced some interesting data: By counting back from the date of birth National determined that the average flight attendant flies three months while pregnant before grounding herself. In some instances flight attendants have flown longer, some as long as five months.

National's own data has produced no evidence of difficulty resulting from these pregnancies other than one spontaneous abortion on a flight from LaGuardia to Miami in 1972. Consequently, as a practical matter National's policy permits flight attendants to complete their first trimester of pregnancy with passing marks. In

addition, the evidence is overwhelminghly against National in connection with the first trimester. It compels a finding that a pregnant stewardess can perform any of the safety tasks required for her during her first trimester of pregnancy that she could perform when non-pregnant. It is true that most spontaneous abortions occur during the first trimester of pregnancy as does nausea (morning sickness) and both are rare after that. However, National's own data as well as that of Northwest, do not support a conclusion that a pregnant flight attendant in her first trimester is a safety hazard aloft.[18]

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18. Plaintiffs assert that many of the symptoms suffered by pregnant women during the first trimester are similar to those suffered by a woman during menses, and stress that National does not require its female flight attendants to be grounded during those periods. National contends that most stewardesses bid around those periods; however, stewardesses lacking seniority to bid successfully do not have that option.

As for the third trimester, plaintiffs' own medical experts do not suggest that pregnant stewardesses should be flying. Dr. Pritchard does suggest that an occasional stewardess could still perform her safety duties; however, the evidence is overwhelming[19] that flight attendants should not fly during the final trimester. Under the Usery test, the court must conclude that as a blanket rule National may require its flight attendants not to fly during the final trimester of pregnancy.

The difficult area is the middle trimester. There is no body of data--fortunately--to show whether stewardesses in their twentieth week of pregnancy have been able to man their safety stations in the event of a crash or forced evacuation.

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19. For example, this was the unanimous consensus by the Mayo Clinic staff which was the basis for Northwest's present policy.

Consequently, the court must sift through the conflicting medical opinions and the evidence relevant and material to the issue.

The court concludes that National has established from the evidence that a stewardess should not fly past the twentieth week of pregnancy but that National has failed to establish that a pregnant flight attendant should be automatically barred from flying from the thirteenth to the twentieth week. In that period of pregnancy the court finds that whether a stewardess can discharge her safety factors is an individual matter and should be treated accordingly. After the thirteenth week a medical certification that the flight attendant is medically fit and capable of carrying out her assigned duties can be required before the flight attendant can continue her flight duties.

The court is persuaded by the evidence that many physicians may well not understand the rigors of the duties of a flight attendant and agrees with the medical opinion that suggests doctors will certify largely what their patients want them to do.[20] Consequently, as approved in Cleveland Board of Education v. LaFleur, 414 U.S. at 647 n.14, 94 S.Ct. 791, in the period from the end of the first trimester to the twentieth week of pregnancy, National may require certification from a physician of its choosing before the flight attendant may perform her flight duties.

The court further finds the conclusion of one of plaintiffs' medical experts, Dr. Carter, the medical director of Northwest to be quite sound: if a stewardess must

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20. The court admits to a certain degree of cynicism in this regard based upon several years of examining medical "excuses" written in behalf of prospective jurors.

wear maternity clothes, her abdomen has been distended and weakened to the point that she should not be flying. The court must conclude that at that stage of pregnancy she could not be reasonably expected to perform such safety duties, among others, as opening the door of a 727 and inflating the safety chute; pulling a 130 pound life raft from its overhead compartment; or clambering through the escape hatch from the galley of a DC-10 in order to assist the evacuation of passengers.

Two factors persuade the court that 20 weeks is the appropriate termination point for flight attendants. First, National flies a great number of over-water routes with substantial over-water flight time.[21] The weight of the life rafts, which flight

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21. Plaintiffs suggest that even if a pregnant stewardess wouldn't be able to discharge her safety duties, the court shouldn't find such inability as the basis for a valid BGOQ because National schedules

attendants are required to deploy in an emergency, becomes an increasing burden upon a stewardess whose strength and agility decrease in the latter half of her pregnancy. The decreases in strength and agility are accompanied by marked changes in the development of the fetus--the second factor.

In the second trimester of pregnancy the top of the uterus will have left the bony pelvis and by the twentieth week be at the level of the navel. After that the uterus either moves up to halfway between the umbilicus and the mid-line of the bony chest cage or if the abdominal wall is

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(Footnote 21 continued)

more ("redundant") flight attendants than required by the F.A.A. on all flights except aboard the smaller 727. The suggestion that the court ignore an important safety factor is rejected.

relaxed the uterus may tend to fall forward. Dr. Pritchard, a witness for plaintiffs, testified there would be no changes in the muscle or skeletal system of a pregnant worman up to the twentieth week. After that it would depend on the position assumed by the pregnant uterus. He also testified that up to twenty weeks the changes in abdominal girth are quite modest. Dr. Creasy, another expert of plaintiffs, testified that the performance of duties by a flight attendant would be contra-indicated in the middle of the second trimester. These opinions of plaintiffs' experts, coupled with the unanimous opinion of defendant's medical experts that pregnant stewardesses shouldn't fly at all, compel the finding by the court that twenty weeks is the appropriate point for pregnant stewardesses to terminate flight duties.

PRETEXT

Plaintiffs assert that National's policy, followed in concert by all other United States trunk carriers except Northwest, is merely a pretext and based upon marketing factors rather than upon safety. Plaintiffs point out National refused to hire male flight attendants until nearly two years after Diaz and that previously it successively refused to hire married stewardesses and later terminated married stewardesses when they became pregnant. Plaintiffs contend National has changed its policy only in a gradual grudging retreat and that the continuing basis for National's holding its ground was marketing considerations.

The Supreme Court has suggested several factors which are pertinent to the determination of whether an otherwise BFOQ is being employed as a pretext to violate

Title VII. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Griggs v. Duke Power Co., supra. One of these factors is the prior history of the company's employment policies as that relates to the issue of sex discrimination. McDonnell Douglas Corp. v. Green, supra at 804-05, 93 S.Ct. 1817. Another factor is the "job-relatedness" of the policy. Griggs v. Duke Power Co., supra, 401 U.S. at 431, 91 S.Ct. 849.

National strongly disputes that its present maternity leave policy has anything to do with marketing considerations. In fact, the evidence is uncontradicted that National's present maternity leave policy costs National money because it requires the training and employment of additional flight attendants to replace those who are grounded because of pregnancy. In addition, National contends that if marketing considerations were the reason for the

policy, National would permit the stewardess to fly until she "shows" rather than until she "knows". Not only the evidence but the logic of that position supports National and vitiates the claim of pretext.[22]

Although plaintiffs' assertion would suggest that National's grudging retreat falls within one of the categories set forth in McDonnell Douglas, two factors weaken plaintiffs' position. First, it can hardly be said that the failure of National to conform immediately to the Diaz opinion constitutes sex bias in favor of males. See also Stroud v. Delta Airlines, Inc.,

22. Plaintiffs' rejoinder is that the airlines insist on the pregnant flight attendants going on maternity leave as soon as she knows rather than when she shows because the latter would obviously be a policy based on marketing considerations. However, the argument is speculative and not supported by any evidence while National's position is strongly supported by the testimony of Mr. Donlan, vice president for industrial relations, and was not contradicted.

544 F.2d 892 (5th Cir. 1977). Secondly, the policy under consideration is more intimately related to passenger safety than any of National's previous policies pointed to by plaintiffs. It is clear that as a common carrier National is required by its operating certificate to "assure safety in [its] air transportation" 49 U.S.C. § 1424. Accordingly, plaintiffs' claim of pretext must fail.

THE "START" POLICY

National's "start" policy is designed and administered with much greater flexibility than its "stop" policy. A flight attendant, subject to medical approval and completion of recurrent training, may return to work at any time from the date of delivery to 60 days afterwards. If a flight attendant needs extra time, she may request an extension within the 60 day period and if it is supported by medical

justification from her physician, it will be routinely and automatically granted.

Although the Court in LaFleur disapproved of the mandatory leave provisions under review, it did not conclude that the return to work provision was improper.[23] Cleveland Board of Education v. LaFleur, supra, 414 U.S. at 648-50, 94 S.Ct. 791. That provision required medical certification prior to a teacher's returning to work. Id. at 648, 94 S.Ct. 791. Thus, this court perceives National's similar requirement as wholly proper. Moreoever, as recurrent training is mandated by 14 C.F.R. § 121.427, the court is constrained to approve that restriction as well. Because a stewardess is not barred from returning to work at any time following

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23. One facet of the return to work rule of the Cleveland case was held improper. No return before the infant reaches the age of three months. The Virginia rule and the rest of the Cleveland rule were approved.

delivery, National's "start" policy does not discriminate between the sexes and, thus, does not violate Title VII.[24]

The court recognizes that the 60 day provision presents some potential for abuse. However, the evidence is clear and convincing that National always accedes to a timely medically-supported request for extension. Because the court must make its determination on the record, rather than in the abstract, the court can find no fault with that portion of the policy. See Cleveland Board of Education v. LaFleur, supra at 650, n.16, 94 S.Ct. 791.

SUMMARY

The court's holding for the female flight attendants has been set forth in detail. For National's female employees

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24. Ms. Olhausen, for example, had a baby on October 6, 1973, completed recurrent training ten days later and returned to work on November 1.

whose duties do not involve flying, the court concludes that there is no BFOQ justifying a termination of her employment prior to delivery, subject to the individual employee producing a satisfactory medical certification of her capability to perform her duties after the twentieth week. National has the right to require an examination and approval by a physician of its choosing.

It should be noted that National did not defend the claims of the ground employees and presented no evidence in support of a business necessity defense. Judgment to be entered in accordance with this memorandum opinion on the issue of liability. The trial on damages is to be set by further order of the court.

DONE AND ORDERED this 17th day of May, 1977.

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